

Ethics, Mental Health and Wellness: The “Call Bob” Rule and Other Resources for Substance Abuse or Mental Health

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Introduction

The practice of law is hard. Very hard. Even if done the correct way.
Especially if done the correct way.

Lawyers often sacrifice much for the sake of the practice of law, including those things that keep us grounded. We neglect family, friends, and at times, ourselves. The pressures often lead to emotional problems, such as anxiety or depression. Sometimes those pressures or the resulting emotional problems can lead to alcohol or other substance abuse. The problems can also lead a lawyer to conduct that violates the rules governing ethics in South Carolina.

These materials discuss disciplinary cases in which the Court commented on the presence of substance abuse or mental health issues when deciding the matters. This includes the ABA's guideposts on aggravation and mitigation evidence.

The materials then provide resources available to a lawyer who believes he or she knows someone who is experiencing cognitive difficulty or may have problems with substance abuse.

Finally, the materials point to resources available through the SC Bar for health and wellness.

The Impact of Mental Health and Substance Abuse on Attorney Disciplinary Cases

In South Carolina, “[w]hile substance abuse is not a mitigating factor in attorney discipline matters, it is a factor in determining the appropriate sanction.” *In the Matter of Woodruff*, 313 S.C. 378, 379, 438 S.E.2d 227, 228 (1993), *citing Matter of Lempesis*, 293 S.C. 510, 362 S.E.2d 10 (1987)). *See also Matter of Locklair*, 418 S.C. 467, 795 S.E.2d 9 (2016) (Court placed lawyer on interim suspension and then incapacity inactive status following his involuntary commitment for substance abuse; lawyer disbarred for numerous matters involving misconduct that all related directly to lawyer’s substance abuse).

The ABA has set forth standards for imposing sanctions upon lawyers that include mitigating and aggravating factors:

9.0 AGGRAVATION AND MITIGATION

9.1 Generally

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.2 Aggravation

9.21 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

9.22 Factors which may be considered in aggravation.

Aggravating factors include:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution.
- (k) illegal conduct, including that involving the use of controlled substances.

9.3 Mitigation

9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 Factors which may be considered in mitigation.

Mitigating factors include:

- (a) absence of a prior disciplinary record;

- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical disability;
- (i) **mental disability or chemical dependency including alcoholism or drug abuse when:**
 - (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;**
 - (2) the chemical dependency or mental disability caused the misconduct;**
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and**
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.**
- (j) delay in disciplinary proceedings;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

9.4 Factors which are neither aggravating nor mitigating.

The following factors should not be considered as either aggravating or mitigating:

- (a) forced or compelled restitution;
- (b) agreeing to the client's demand for certain improper behavior or result;
- (c) withdrawal of complaint against the lawyer;
- (d) resignation prior to completion of disciplinary proceedings;
- (e) complainant's recommendation as to sanction;
- (f) failure of injured client to complain.

MODEL RULES OF PROF'L CONDUCT ANN. (AM. BAR ASS'N 2015). Our Court has not officially adopted those standards but the Court has cited to them. *Matter of Jordan*, 421 S.C. 594, 809 S.E.2d 409 (2017) (discussing the ABA factors when addressing lawyer's contention that health and dependency problems impacted his misconduct).

It is vitally important to follow up with any agreements entered with ODC or Lawyers Helping Lawyers (LHL). For instance, in *Matter of Reynolds*, 406 S.C. 356, 751 S.E.2d 662 (2013), the lawyer misappropriated \$3,165.00 from his trust account and used the funds for personal debts and expenses. During the ODC investigation the lawyer returned the funds. He admitted to abusing alcohol and drugs and voluntarily entered into a relationship with LHL. He also began

treatment for alcohol and substance abuse. The lawyer acknowledged his misappropriation arose, in part, from his substance abuse and his failure to seek adequate and appropriate treatment.

An investigative panel accepted a deferred discipline agreement (DDA) the lawyer signed. The lawyer agreed to comply with terms and conditions for two years, including compliance with the LHL contract, psychological counseling, quarterly reporting to the Commission, payment of costs, and completion of LEAPP Ethics School and Trust Account School within 6 months.

The lawyer failed to comply with the terms of the DDA. In part, he began drinking again and was arrested for DWI. He then sought in-patient treatment but left the facility and had no further contact with ODC or the Commission. ODC moved to terminate the DDA but the Commission denied the motion and agreed to extend it for another 2 years. The lawyer then signed a second DDA and entered into a new contract with LHL. However, he failed to comply, including a resumption of alcohol use. An investigative panel then terminated the second DDA and authorized formal charges.

The lawyer then entered into an agreement for discipline which the Court accepted. The Court imposed a 9-month suspension with the following conditions for two years:

“1. respondent shall enter into a new contract with Lawyers Helping Lawyers which shall include, at a minimum, a random blood test for use of drugs and alcohol each quarter at respondent’s expense;

2. respondent shall fully participate in a meaningful relationship with a monitor selected by Lawyers Helping Lawyers;

3. respondent shall commit himself to abstinence and will attend meetings in a twelve-step or other appropriate program designated by, and in accordance with a regular schedule set by, Lawyers Helping Lawyers;

4. respondent shall comply with all treatment recommendations of a medical provider to address his addiction and substance abuse; and

5. respondent shall file quarterly reports with the Commission that include a statement confirming compliance with his contract from a representative of Lawyers Helping Lawyers, a statement from his monitor outlining their interactions, a statement of his diagnosis, treatment compliance, and prognosis from his medical treatment provider, and the results of at least one random blood test. The filing of these reports shall be respondent’s responsibility and will be done at his expense.

406 S.C. at 359-360, 751 S.E.2d at 664. The bottom line is that while ODC, LHL and the Court will extend their assistance, any agreement is only as good as the lawyer’s willingness to follow through with the help.

An example of that leniency is *Matter of McMaster*, 419 S.C. 37, 795 S.E.2d 853 (2017). There, a lawyer was arrested for DUI in 2013, pleaded guilty and paid a fine. About a year later the lawyer was arrested and charged with several offenses, including use of a firearm while under the influence of alcohol or drugs. He pleaded guilty for unlawful carrying of a pistol and paid a fine. However, the

Court placed him on interim suspension. See *In re McMaster*, 407 S.C. 213, 755 S.E.2d 107 (2014).

Thereafter ODC and the lawyer entered stipulations that included the lawyer's pledge of sobriety and his participation with LHL and AA. The Court suspended the lawyer for 30 months retroactive to the interim suspension and adopted the panel's recommendation of ongoing monitoring of the lawyer's conditions. The Court noted that while substance abuse is not a mitigating factor in attorney disciplinary matters, it is a factor in determining the appropriate sanction.

In *Matter of Fitzharris*, 415 S.C. 362, 782 S.E.2d 596 (2016), a lawyer underwent several surgeries and there were complications in nearly every one. She began taking narcotics and muscle relaxers to alleviate the pain and muscle spasms. She also entered treatment for depression and anxiety related to her physical ailments. She was suspended for 3 months for neglecting several matters, all of which were related to her health problems.

In *Matter of Parker*, 418 S.C. 376, 793 S.E.2d 302 (2016), the Court ordered a 2-year suspension for a lawyer for neglecting several matters. The Court noted that the lawyer contended the matters occurred during a time when she was using prescription drugs and alcohol to cope with stress and depression. The Court stated, "Based on her agreement to do so, we order respondent upon any readmission to either retain the services of a mental health professional for a period

of two (2) years or to enter into a two (2) year contract with Lawyers Helping Lawyers. During that two (2) year period or the two (2) year contract, respondent shall submit quarterly reports from either her mental health treatment provider or her Lawyers Helping Lawyers monitor to the Commission.” 418 S.C. at 383, 793 S.E.2d at 306.

In sum, when a lawyer has engaged in misconduct that is directly related to some issue of mental health or substance abuse, the Court will require the involvement of LHL or some other support group, and will factor those issues into its determination of an appropriate sanction. The best way to deal with these issues is to acknowledge them and seek the help that is available.

The “Call D Ross” (the “other” D Ross) Rule

In August 2015, the Supreme Court issued the following order

The Chief Justice’s Commission on the Profession has proposed several amendments to the South Carolina Appellate Court Rules to address issues with lawyers who are suffering from cognitive impairments. The goal of these amendments is to clarify the duties and responsibilities of lawyers and judges who notice problems, provide compassionate assistance to lawyers in need, and protect the public.

Pursuant to Article V, § 4 of the South Carolina Constitution, we adopt Rule 428, SCACR, and amend Rule 5.1, RPC, Rule 407, SCACR, and Canon 3, CJC, Rule 501, SCACR, as set forth in the attachment to this Order.

Re: Amendments to SC Appellate Court Rules, Order (S.C. Sup. Ct. filed Aug. 24, 2015) (Shearouse Adv. Sh. No. 33 at 29). Through this order, the Court adopted Rule 428, SCACR, entitled “Intervention to Protect Clients.”

(a) The Executive Director of the South Carolina Bar, upon receipt of a written report or referral pursuant to Rule 5.1, RPC, Rule 407, SCACR; pursuant to Canon 3, CJC, Rule 501, SCACR; or from a member of the South Carolina Bar expressing concern about cognitive impairment of another lawyer shall take such actions as he or she deems advisable. Upon the Executive Director’s recommendation, the President of the Bar may appoint one or more Attorneys to Intervene. The Attorneys to Intervene shall attempt to meet with the lawyer alleged to be impaired and, if in the best interest of both the lawyer and the public, propose a course of conduct to be followed.

(b) The Attorneys to Intervene shall promptly report to the Executive Director whether any actions were recommended to the lawyer, whether the lawyer agreed to any recommendations, and whether further action is recommended. Further action may include action under Rule 28, RLDE, Rule 413, SCACR. In the event a referral to the Commission on Lawyer

Conduct is recommended by the Attorneys to Intervene, that referral shall be made by them promptly.

(c) The Attorneys to Intervene, the Executive Director of the South Carolina Bar, and the President of the Bar shall be immune from civil action for their actions taken in good faith under this rule. Information received by those Attorneys shall not be forwarded to the Office of Disciplinary Counsel in the event that a referral is not recommended under paragraph (b).

Because Bob Wells was the executive director of the SC Bar, many of us affectionately labelled this the “Call Bob” rule. Since David Ross has now taken over as the Bar's executive director, I suppose we should call this the “D Ross” rule (but not the “D Ross” many of us know at McAngus Goudelock & Courie and from his basketball prowess).

The Court also amended Rule 5.1(d), RPC, Rule 407, SCACR, and Comment 9 to the Rule to provide:

(d) Partners and lawyers with comparable managerial authority who reasonably believe that a lawyer in the law firm may be suffering from a significant impairment of that lawyer’s cognitive function shall take action to address the concern with the lawyer and may seek assistance by reporting the circumstances of concern pursuant to Rule 428, SCACR.

. . .

[9] Paragraph (d) expresses a principle of responsibility to the clients of the law firm. Where partners or lawyers with comparable authority reasonably believe a lawyer is suffering from a significant cognitive impairment, they have a duty to protect the interests of clients and ensure that the representation does not harm clients or result in a violation of these rules. See Rule 1.16(a). One mechanism for addressing concerns before matters must be taken to the Commission on Lawyer Conduct is found in Rule 428, SCACR. See also Rule 8.3(b) regarding the obligation to report a violation of the Rules of Professional Conduct when there is knowledge a violation

has been committed as opposed to a belief that the lawyer may be suffering from an impairment of the lawyer's cognitive function.

Finally, the Court amended Canon 3, CJC, Rule 501, SCACR, to add the following:

G. Disability and Impairment. A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to an appropriate lawyer or judicial assistance program.

Commentary:

Appropriate action means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program, such as Lawyers Helping Lawyers or the South Carolina Bar in accordance with Rule 428, SCACR.

Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate disciplinary authority. See Canon 3(D)(1) and (2).

All of these provisions work in tandem to provide members of the Bench and Bar a means for intervening on behalf of a lawyer or judge under circumstances where the lawyer or judge who observes impairment is hesitant to act.

Health and Wellness

The South Carolina Bar provides a number of resources related to physical health and wellness called “Living Above the Bar.” *See*

<https://www.livingabovethebar.org/>

There are a number of helpful articles that outline things lawyers can do to maintain a healthy lifestyle. This includes:

- LHL information, including free counseling services:

<https://www.scbar.org/lawyers/member-benefits-assistance/lawyers-helping-lawyers/>

- resources for mental health: <https://www.livingabovethebar.org/resources/>

- A video and suggestions for stress management:

<https://www.livingabovethebar.org/stress-management/>

- Resources for Social Well-Being:

<https://www.livingabovethebar.org/worklife-balance/>

- A “Lawyer-to-Lawyer” directory for free assistance from lawyers who have experience in specific areas of the law:

<https://www.scbar.org/lawyers/member-benefits-assistance/lawyer-to-lawyer-directory/>

LHL's page includes a free **helpline**:

Call the Lawyers Helping Lawyers toll free helpline at (866) 545-9590 or contact any of the Lawyers Helping Lawyers committee members directly.

The "Free counseling services" through LHL are described as follows:

Free counseling services

CorpCare will provide up to five free hours of intervention counseling for attorneys experiencing emotional or stress-related issues. Lawyers using the service will remain completely anonymous. Bar members may call CorpCare toll-free at (855) 321-4384 to be referred to a counselor in their area 24 hours a day.

These five (5) free hours of intervention are a benefit you enjoy for being a member of the SC Bar.

The Bar's Web Site also includes discounts for a number of physical fitness services listed on the Bar's Web Site at <https://www.scbar.org/lawyers/member-benefits-assistance/member-benefit/wellness-benefits/>

For information regarding members of the Attorney Wellness Committee, see <https://www.livingabovethebar.org/about/>

In sum, Living Above the Bar is an amazing resource you have at your fingertips simply for being a member of the Bar. Use it!

Conclusion

As I stated at the outset, the practice of law is very hard. But it is also very rewarding both emotionally and monetarily. We help others who need our help, and we protect them when they are at their most difficult time. We provide them the means for being heard, and assistance in resolving disputes. Sometimes we just provide them a place to vent, to express frustration, or to ease their fears.

None of us is alone regardless of the circumstances in which we find ourselves. Both the Court and the SC Bar have provided resources through which we can seek help for ourselves or for others.